Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-1899

IRENE MUELLER,

Petitioner,

vs.

DAVID DIEBALL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COTKIN, COLLINS, KOLTS & FRANSCELL
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Attorneys for Respondents
DAVID DIEBALL, MICHAEL P. STONE,
FOREST SCOTT STANTON, JOHN KENNEY,
and THE CITY OF ORANGE

BEST AVAILABLE COPY

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EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

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TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW, respondents, DAVID DIEBALL, MICHAEL P. STONE, FOREST SCOTT STANTON, JOHN KENNEY, and THE CITY OF ORANGE, and oppose the Petition for Writ of Certiorari filed by the petitioner, THE ESTATE OF IRENE MUELLER.

Pursuant to Rule 22, Rules of the Supreme Court of the United States, respondents submit the following Brief in Opposition:

GROUNDS WHY CASE SHOULD NOT BE REVIEWED BY THIS COURT

1. The petitioner is collaterally-estopped from raising the issue of negligent loss of evidence because this issue was raised and resolved adversely against her at her criminal trial;

2. There is no Federal jurisdictional basis for the common law tort of negligent failure to preserve evidence;

3. Under Harlow v. Fitzgerald, 457 U.S. 800 (1983), the individual respondent police officers are immune from the petitioner's claims;

4. Under Monell v. Department of Social Services, 436 U.S. 658 (1978), the

respondent City of Orange is immune from the petitioner's claim;

5. Under Wilson v. Garcia, ____ U.S. ____, 105 S.Ct. 1938 (1985), the petitioner's claims are barred by the applicable state statute of limitations as untimely.

PARTIES INVOLVED

Plaintiff:

(1) Estate of Irene Mueller

Defendants:

(1) J. C. Penney Company

(2) Carol J. Manstrom

(3) Valerie Rich

(4) Liberty Mutual Insurance Company

(5) Dolores May Carson

(6) Marijane Ramstead

(7) Ted Chatterton

(8) David Dieball

(9) Forest Scott Stanton

(10) John Kenney

(11) Michael P. Stone

(12) The City of Orange

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STATEMENT OF THE CASE

On January 25, 1979, the petitioner, Irene Mueller, went shopping in a J. C. Penney Store located in the City Mall in Orange. While in the cosmetics department, she shoplifted four perfume bottles by placing these items in her purse without paying for them. Upon exiting the store, the petitioner was stopped by a J. C. Penney security officer, Carol Manstrom. Ms. Manstrom had seen the petitioner shoplift the perfume bottles. Carol Manstrom identified herself as a security officer and requested the petitioner to return to the store.

The petitioner refused to return to the store and instead attacked Ms. Manstrom. Both a construction worker (Michael Anderson) and an unidentified man (referred to in the later criminal trial as "Mr. X") witnessed this assault and separated the women.

Subsequently, the petitioner, Ms. Manstrom, and Mr. X re-entered the store. At that time, the petitioner was informed by the J. C. Penney personnel that she was under citizen's arrest. The petitioner was escorted to a security office in the store. J. C. Penney personnel informed the Orange Police Department that a suspect was in custody for theft, assault and battery upon a store security officer.

In response, the Orange Police Department sent Officer Kenney to the store. Since Officer Kenney's shift was about to end, the Orange Police Department later dispatched a replacement officer (Officer Stanton). In the interim, Officer Kenney communicated with Mr. X and took a business card from the individual. Mr. X was in the security office for approximately twenty minutes, conversing with the petitioner and making a telephone call to his employer.

Prior to leaving, Officer Kenney believes that he gave the business card to Officer Stanton.

Officer Stanton then read the petitioner her Miranda rights, which she chose to waive. She confessed to Officer Stanton that she had shoplifted the items because she had been unable to find anyone to help her in the store. Detective Dieball also arrived and he received permission from Officer Stanton to step into the outer hallway with the petitioner to obtain her side of the assault incident outside the presence of Carol Manstrom (who was located in the security office).

During this time, Carol Manstrom completed a "Store Report of Apprehension" and a "Order of Arrest by a Private Person." She signed both of these reports and provided Officer Stanton with copies. Subsequently,

Officer Stanton escorted the petitioner to his police vehicle. The petitioner was taken to the Orange Police Department, where she was booked and then released.

On January 29, 1979, a criminal complaint was filed against the petitioner alleging three counts: (1) petty theft under California Penal Code §484-§488, (2) assault under Penal Code §240 and (3) battery under Penal Code §242. Prior to trial, the petitioner made several motions. One motion was to have her confession to Officer Stanton ruled inadmissible because it was involuntary. This motion was denied.

A second motion was made to dismiss the pleadings on the theory that the prosecution had failed to produce a material witness (a Hitch-type Motion). The witness was the above-referenced Mr. X, who witnessed the petitioner's assault and battery of Carol

Manstrom. A hearing was conducted during which the Court heard testimony from Irene Mueller, Carol Manstrom, and Officers Dieball, Stanton, and Kenney. On January 31, 1980, this motion was denied by the Honorable Barbara Tamm Thompson. In so ruling, Judge Thompson made the following four explicit findings of fact:

> "(1) Defendant had ample opportunity to discover X's name and address. Credible evidence demonstrates that defendant was not prevented from conversing with X, and did engage in conversation with him for approximately 20 minutes; (2) defendant's mistaken belief that the police would obtain X's identity is not sufficient justification to excuse defendant from the responsibility of safeguarding her own interests, or to cause the police officers to serve as defense investigators; (3) credible evidence demonstrates that defendant was able to determine that X was a teacher like herself, and that he had possibly taught in Pasadena. Credible evidence also shows the defendant was able to listen to X's phone conversation with his place of employment and, as a result, was able to determine that he may work at St. Joseph's Hospital. Such ability indicates the defendant was not suffering from such physical or mental distress as to be unable to determine X's identity;

and (4) credible evidence demonstrates that the loss of X's card by the police was unintentional and was not tainted with the degree of wrongdoing set forth in the above-cited cases. Credible evidence further demonstrates that X's card is valueless as it did not contain an address or telephone number for X." (A copy of these findings is attached hereto as Appendix A.)

On November 3 through November 10, 1980, the criminal trial of the petitioner was conducted. Following deliberation, the twelve member jury found the petitioner guilty on all three counts. The Court thereafter sentenced the petitioner to three years probation and a $250.00 fine. Thereafter, the petitioner appealed her criminal conviction to the Appellate Division, Superior Court, State of California, on the theory that (1) the Trial Court erroneously refused to dismiss the case on a Hitch-type motion (i.e., the police had destroyed evidence material to her guilt, consisting of the unidentified witness's

business card), and (2) the Court erroneously refused to charge the jury with several requested sets of instructions.

Upon denial of this appeal, the petitioner unsuccessfully pursued her appeal all the way to the California Supreme Court, which denied her Petition for a Writ of Certiorari on or about November 13, 1981. The petitioner then filed a Petition for a Writ of Certiorari with the United States Supreme Court to review the propriety of the criminal conviction. On or about March 22, 1982, the petition was denied. (See Appendix B.)

Since that time, the petitioner and her husband, Mr. Frank Marchuk, have vexaciously filed the instant Federal Court lawsuit as well as numerous State Court lawsuits essentially challenging the

shoplifting convction.[1/] The five State Court actions consist of: (1) Mueller v. J. C. Penney Company, et al., Orange County Superior Court Case No. 31-26-58; (2) Marchuk v. J. C. Penney Company, Inc., et al., Orange County Superior Court Case No. 31-43-69; (3) Mueller v. Manstrom, et al., Orange County Superior Court Case No. 33-97-73; (4) Marchuk v. Patrick Quinlivan, et al., Orange County Superior Court Case No. 32-66-40: and (5) Marchuk v. Dieball, et al., Orange County Superior Court Case No. 36-64-11. Four of these cases have proceeded to trial with the petitioner and her husband losing and, in fact, in one case having $15,000.00 punitive damages assessed against the petitioner by the jury; these verdicts

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1/ The petitioner and her husband also filed State Bar Complaints against these respondents' counsel, Mr. Bradley C. Withers, and against counsel for the J. C. Penney group of defendants. The State Bar subsequently found these charges without merit.

are currently on appeal. The respondent City of Orange and its police officers successfully were dismissed from the fifth State Court lawsuit, Marchuk v. Dieball, et al., with that action currently pending against the other respondents, J. C. Penney, and its various employees.

The instant Federal Court lawsuit was filed on March 16, 1981. Both sets of respondents thereafter filed Summary Judgment Motions, which the District Court granted on June 7, 1982. The District Court made numerous explicit findings of fact and conclusions of law. These included findings that the respondents did not conspire to deprive the petitioner of her constitutional rights [Findings of Fact Nos. 6, 7, 8, 9, and 10] and that all the respondents acted in good faith at all relevant times [Finding of Fact No. 11]. (See Appendix C.)

The District Court's conclusions of law included findings that the petitioner was collaterally estopped to raise claims regarding the loss of Mr. X's business card because that issue was decided adversely to her at the criminal trial [Conclusion of Law No. 3]. Also, the District Court found that as a matter of law the City could not be found liable on a Monell theory. [Conclusion of Law No. 6.] (See Appendix C.)

Earlier, the District Court ordered that the petitioner's testimony not be introduced into evidence in connection with the Summary Judgment Motion or at the time of trial because of the Petitioner's continued willful failure to submit to deposition. The petitioner did not appeal or contest the District Court's sanctions in this regard. The District Court with respect to the Summary Judgment Motions further found that the petitioner had willfully failed to

prosecute her action by her misconduct [Finding of Fact No. 14]. (See Appendix C.)

ARGUMENT

A. THE PLAINTIFF IS COLLATERALLY ESTOPPED FROM RAISING THE ISSUE OF NEGLIGENT LOSS OF EVIDENCE BECAUSE THIS ISSUE WAS RAISED AND RESOLVED ADVERSELY AGAINST HER AT HER CRIMINAL TRIAL

The sole substantive issue for review raised by the petitioner is whether she can properly state a federal civil rights action based upon the alleged negligent loss of Mr. X's business card by Officers Kenney and Stanton. The petitioner essentially argues that although she did not submit competent counter-affidavits on this point due to her willful failure to obey previous Court orders, the affidavits of the

respondent officers in support of the Summary Judgment Motion creates a genuine issue of fact in this regard. The petitioner argues that card of Mr. X was negligent and proximately caused the petitioner's damages, so as to preclude the granting of Summary Judgment in favor of these respondents.[2/]

This is not true. In Conclusion of Law No. 3, the District Court explicitly found that the petitioner was collaterally estopped from raising any issue about "the loss of evidence" because that issue was

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2/ The scope of the petitioner's argument is limited to negligent destruction of evidence, and not intentional destruction. The District Court explicitly found that none of the defendants conspired to destroy the business card or suppress the identity of Mr. X. (Appendix C, Findings of Fact Nos. 6 and 9). Since there is no rebuttal evidence at all concerning these findings, the petitioner is precluded from contending at this point that a genuine issue exists whether the alleged loss of the business card was intentional.

adversely decided against her in the criminal trial. As is evidenced by the Criminal Trial Court's findings (see Appendix A hereto), the Trial Court explicitly found that "credible evidence. . .does not demonstrate that there is a reasonable possibility that X is a material witness to the petty theft charge". Since the Trial Court found that as a matter of law Mr. X was not a material witness to the petty theft charge, the petitioner is collaterally estopped from alleging a negligence claim because one vital element of the claim -- proximate causation -- is therefore missing. See Duncan v. Nelson, 466 F.2d 939 (7th Cir., 1972), cert. den., 93 S.Ct. 116, 175 (1972).

In Allen v. McCurry, 49 U.S. 90 (1980), this Court held that the affirmative defenses of res judicata and collateral estoppel are fully applicable in federal civil rights actions. In Allen, the

plaintiff was charged with unlawful possession of heroine and assault upon a police officer with intent to kill. The plaintiff unsuccessfully brought a suppression motion to exclude certain evidence during his criminal trial and he was thereafter convicted on both counts. Subsequently, the plaintiff brought a damage action under Title 42 U.S.C. §1983 alleging that certain under cover police officers and the City of St. Louis had violated his Fourth Amendment right prohibting unconstitutional searches and seizures. The Supreme Court affirmed the District Court's Summary Judgment for the defendants, noting that collateral estoppel prevented the plaintiff from relitigating search and seizure questions because it had already been decided against him in the State criminal proceedings.

Here, the Criminal Trial Court's finding that Mr. X was not a material witness to the shoplifting incident must be given preclusive effect. The petitioner appealed her criminal conviction on this very issue up through the California Supreme Court up to this Court, without success. Such preclusive effect is the death knell for the petitioner's attempt to state a valid federal civil rights claim.[3/]

3/ The state tort of negligent failure to preserve evidence must, in general terms, be based upon the existence of a promise to preserve evidence and reasonable reliance thereon by the complainant. Williams v. State of California, 34 Cal.3d 18, 25; 192 Cal. Rptr. 233 (1983). In the present case, the other findings by the Criminal Court operate to bar the petitioner's claim, in that it was found that the petitioner did not reasonably rely upon the respondent officers to obtain identity information concerning Mr. X. (Appendix C.)

B. THERE IS NO FEDERAL JURISDICTIONAL BASIS FOR THE COMMON LAW TORT OF NEGLIGENT FAILURE TO PRESERVE EVIDENCE

Even if the petitioner could somehow evade the collateral estoppel effect of the Criminal Trial Court's determination regarding the loss of Mr. X's business card, the instant Petition is defective in that no jurisdictional basis exists for the common law tort for negligent failure to preserve evidence.

This common law tort, recognized in California in extremely limited situations with respect to police officers, does not rise to the dignity of a federal civil rights violation. See generally Baker v. McCollan, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979). The petitioner apparently believes that the loss of evidence constitutes a

violation of her right to a fair trial and due process.

The petitioner relies upon Henderson v. Fisher, 631 F.2d 1115 (3rd Cir., 1980) as support for her contention. Henderson, however, involved in the alleged intentional destruction of material evidence. The decision is silent on such salient points as to whether this alleged intentional destruction of evidence was raised in the criminal proceedings, or whether adequate state tort remedies existed for the plaintiff's claims.

This Court's decisions since the date of the Third Circuit's ruling in Henderson demonstrate that no cognizable constitutional right is implicated with respect to the petitioner's negligence claim concerning the loss of Mr. X's business card. The petitioner was provided with full due

process in that she raised this issue with the Trial Court and then unsuccessfully pursued relief up the appeal ladder. Furthermore, the petitioner has all along possessed an adequate state tort remedy to sue the respondents for negligent preservation of evidence under Williams v. State of California, 34 Cal.3d 18, 192 Cal. Rptr. 233 (1983), and the cases cited therein.

Thus, the existence of adequate state criminal and tort remedies satisfy the constitutional concerns raised by the petitioner. The alleged negligent failure to preserve evidence by the respondent officers constitutes the very type of "random and unauthorized" actions which renders a pre-deprivation hearing impracticable. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). By her argument, the petitioner would have this

Court improperly reduce §1983 to a "font of tort law". See also Hudson v. Palmer, _____ U.S. _____, 104 S.Ct. 3194 (1984).

Accordingly, the petitioner's federal civil rights claims are barred due to the abundantly-adequate remedies, both criminal and civil, available to her following her shoplifting arrest and conviction.

C. UNDER HARLOW v. FITZGERALD, 457 U.S. 800 (1982), THE INDIVIDUAL RESPONDENT POLICE OFFICERS ARE IMMUNE FROM THE PETITIONER'S CLAIMS

Independent of the foregoing considerations, the petitioner still fails to state a valid claim against the respondent police officers due to the District Court's unchallenged finding that their actions were at all times in good faith. Under Harlow v.

Fitzgerald, 457 U.S. 800 (1982), this immunizes the respondent officers from the plaintiff's claims. Thus, even if the petitioner's "failure to preserve evidence" allegation somehow were found to constitute the basis for a federal civil rights claim, the suit against the respondent officers is nevertheless barred because of the District Court's finding of good faith.

D. UNDER MONELL V. DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 658 (1978), THE RESPONDENT CITY OF ORANGE IS IMMUNE FROM THE PETITIONER'S CLAIMS

Just as with the individual police officers, the petitioner's claim against the respondent City of Orange is similarly barred due to the District Court's unchallenged finding that the City is not liable under the parameters of Monell v. Department of Social Services, 436 U.S. 658 (1978). Even

if one finds merit with the petitioner's allegation that the alleged negligent loss of Mr. X's business card qualifies as a federal civil rights violation, suit would nevertheless be barred against the City given the District Court's finding on the Monell issue.

Thus, the City is similarly immune from liability in this matter.

E. UNDER WILSON v. GARCIA, ____ U.S. ____, 105 S.Ct. 1938 (1985), PETITIONER'S CLAIMS ARE BARRED IN THE FIRST INSTANCE AS UNTIMELY

In Wilson v. Garcia, ____ U.S. ____, 105 S.Ct. 1938 (1985), this Court recently held that each state's statute of limitations for personal injury actions applies to federal civil rights claims. In California, a one year statute applies to personal injury

claims under California Code of Civil Procedure §338. Under Wilson v. Garcia, therefore, a one year statute of limitations applies to federal civil rights arising in California.

The petitioner's federal civil rights suit was filed on March 16, 1981. The alleged negligent loss of evidence occurred over two years earlier during the time of the petitioner's arrest on January 23, 1979. Accordingly, the petitioner's federal civil rights claim is barred in the first instance as untimely. For this additional reason, the instant petition merits denial.

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CONCLUSION

Based upon the foregoing reasons, the respondents respectfully submit that vertiorari should not be granted in this matter.

DATED: September 5, 1985.

Respectfully submitted

COTKIN, COLLINS, KOLTS & FRANSCELL

By Bradley C. Withers
BRADLEY C. WITHERS
Attorneys for

APPENDIX A -- ORDER DENYING MOTION TO DISMISS OF THE HONORABLE BARBARA TAMM THOMPSON

EXHIBIT "A"

FILED
MUNICIPAL COURT
CENTRAL ORANGE COUNTY JUDICIAL DIST.
JAN 31 1980
EDWARD W. CADEK, CLERK
By _____ DEPUTY

MUNICIPAL COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
IRENE DOROTHY MUELLER, Defendant

No. 79CM00607

ORDER DENYING MOTION TO DISMISS

Defendant's motion to dismiss Counts I and II of the Complaint having come for hearing on January 28, 1980, before the Honorable Barbara Tam Thompson, E. Wallace Dingman, Deputy District Attorney, appearing on the behalf of the people, and Mary A. Stern appearing on behalf of Irene Dorothy Mueller.

The Court having considered oral argument, testimony, and the points and authority cited by the parties, the Court now makes the following findings:

The Defense has demonstrated a reasonable possibility that the man in a leisure suit (hereinafter referred to as "X") is a material witness to the assault and battery. Credible evidence, however, does not demonstrate that there is a reasonable possibility that X is a material witness to the petty theft charge.

APPENDIX "A"

(1977) 75 Cal.App. 3d 444; and People vs. Flores (1976) 62 Cal.App. 3d Supp. 19 has not been satisfied. The Court bases this conclusion upon the following grounds:

First, Defendant had ample opportunity to discover X's name and address. Credible evidence demonstrates that Defendant was not prevented from conversing with X, and did engage in conversation with him for approximately 20 minutes.

Second, Defendant's mistaken belief that the police would obtain X's identity is not sufficient justification to excuse Defendant from the responsibility of safeguarding her own interests, or to cause the police officers to serve as defense investigators.

Third, credible evidence demonstrates that Defendant was able to determine that X was a teacher like herself, and that he had possibly taught in Pasadena. Credible evidence also shows the Defendant was able to listen to X's phone conversation with his place of employment and, as a result, was able to determine that he may work at St. Joseph's Hospital. Such ability indicates the Defendant was not suffering from such physical or mental distres as to be unable to determine X's identity.

Fourth, credible evidence demonstrates that the loss of X's card by the police was unintentional and was not tainted with the degree of wrongdoing set forth in the above-cited cases. Credible evidence further demonstrates that X's card is valueless as it did not contain an address or telephone number for X.

APPENDIX "A"

Based on the foregoing reasons, the Court denies Defendant's motion to dismiss the petty theft as well as the assault and battery charges.

Dated: January 31, 1980

Judge of the Central Municipal Court

I HEREBY CERTIFY that the foregoing instrument is a true copy of the original on file in this office
ATTEST my hand this 4th day of [illegible] 82
ROBERT B. [illegible]
Clerk of the Municipal Court, County of [illegible]
Deputy

APPENDIX "A"

APPENDIX B -- PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

IRENE MUELLER,

Petitioner

vs.

CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

COURT OF APPEALS

OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION 1

IRENE MUELLER
1311 B S. Anaheim
Anaheim, California
92805
(714) 772-5120

In Pro Per

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

IRENE MUELLER,

Petitioner

vs.

CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

COURT OF APPEALS

OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION 1

IRENE MUELLER
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Anaheim, California
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In Pro Per

APPENDIX "B"

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APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

ENE MUELLER, Petitioner, v. ALIFORNIA, Respondent	PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION 1

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW IRENE MUELLER, IN PRO PER, and petitions this Honorable Court for a Writ of certiorari directed to the Court of Appeals of the State of California Fourth Appellate, Division 1

Pursuant to Rule 23, Rules of the Supreme Court of the United States, Petitioner submits the following:

APPENDIX "B"

(a)

OPINION BELOW

There was no official or unofficial report published by the California Court of Appeals.

(b)

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) The date that the judgment which is sought to be reviewed was entered in August 24, 1981.

(ii) The Supreme Court of California denie a petition for hearing on October 7, 1981, and all state remedies have been exhausted. (Exhibit "E")

(iii) The statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1257(3) which provides:

Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

.By writ of certiorari, where the validity of
treaty or statute of the United States is drawn
question or where the validity of a state statute
drawn in question on the ground of its being
pugnant to the Constitution, treaties or immunity
specially set up or claimed under the Constitu-
on, treaties or statutes of, or commission held
authority exercised under, the United States.
ne 25, 1948, c. 646,62 Stat. 929.

(c)

QUESTIONS PRESENTED FOR REVIEW

Whether a criminal defendant in a state
secution for misdemeanor assault and battery,
petty theft, was denied due process of law
er the 14th amendment when an investigating
liceman, acting as a state representative, will-
ly, negligently or inadvertantly suppressed
usiness card containing at least the name of
aterial witness for the defense when such evi-
ce was requested by petitioner as in the
ning of Brady v. Maryland 373 U.S. 83,87.

APPENDIX "B"

2. Whether evidence which might be helpful to a criminal defendant and which is suppressed by the police would result in a denial of due process as in Mooney v. Holohan 294 U.S. 103,112.

3. Whether a criminal defendant is entitled to a dismissal of a criminal case is justified where the lost evidence is so vital to the defens of the case that a fair trial is impossible without it; that the lack of such evidence deprives the defendant of her fundamental constitutional rights to a fair trial. State v. Heath 147 F.Sup 877.

(d)

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

Fourteenth Amendment-

"All persons or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the stat wherein they reside. No state shall make or enfo any law which shall abridge the privileges or immunities of citizens of the United States; nor

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ll any State deprive any person of life, liberty, property, without due process of law; nor deny any person within its jurisdiction the equal tection of the laws."

(e)

STATEMENT OF THE CASE WITH FACTS MATERIAL THE CONSIDERATION OF THE QUESTIONS PRESENTED:

On January 25, 1979, Petitioner exited a . Penny's store in Orange County, California, rying cosmetic items from the store in her purse.

Petitioner was confronted by a security rd for the store, a Miss Carol Manstrom, and cuffle ensued between the two women.

Thereafter, a man intervened and separated two women. The man's identity was not dis- ered before trial, and it remained unknown at itioner's hearing to dismiss charges.

The identity of the man remains unidentified this day and is the issue of this writ. lible evidence (Exhibit "A" p. 3 & "D" p. 3) s that this unidentified man, referred to

APPENDIX "B"

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by investigating officers, Petitioner was unable to secure witness "X" as a possible favorable witness to her defense.

PETITIONER'S CONTENTION OF WITNESS "X's" MATERIALITY AS TO THE PETTY THEFT:

11. Judge Thompson ruled, as stated above, that witness "X" was not a material witness as to the petty theft charge. However, Petitioner unequivocally stated to the Honorable Judge Frank that witness "X" was in her proximity when she placed the twenty dollars down on the counter. (Exhibit "D" p. 1) There was no credible evidence produced by the prosecutor to refute petitioner's assertion or to establish that the witness was not in the same area as petitioner.

12. Officer Kenny testified at Petitioner's trial that witness "X" could have mentioned to him the possibility of observing other things. Therefore, creating a major inference that witness "X" could have seen the petty theft incident. (Exhibit "C" p. 5)

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REASONS FOR GRANTING WRIT OF CERTIORARI

13. Petitioner was denied her constitutional rights under the Fourteenth Amendment when her direct appeal was denied by the California Court of Appeals, Second Appellate District.

14. On October 7, 1981, the California Supreme Court denied a Hearing. (Exhibit "G")

The foregoing is presented in satisfaction of Rule 23 (f) Rules of the Supreme Court of the United States.

(h)

ARGUMENT

I

WAS PETITIONER DENIED HER DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT BECAUSE OF THE FAILURE OF THE INVESTIGATING OFFICER TO PRESERV THE BUSINESS CARD CONTAINING THE NAME AND ADDRESS OF A POSSIBLE FAVORABLE WITNESS.

Petitioner defense rested on the testimony of witness "X", who observed the assault and

battery and quite possibly the petty theft. Petitioner testified that the witness was extreme helpful towards her during the time after the abr encounter with the security guard (as stated in Exhibit "D" p. 3)

Petitioner has provided direct evidence to refute the findings of the Honorable Thompson as to the materiality of the business card to the defense. First, one can logically conclude that witness "X" gave his card to the police officer because he wanted to be a witness; he wanted to inform the police as to his observation of the incidences.

Secondly, the Honorable Thompson was misinformed as to the fact that the card only contai the name of the witness. As Petitioner has shown already, Officer Kenny, who was the first person to receive the card from the witness, has testifi that the business card did in fact contain not only the name, but also the address and phone numb of the witness.

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Further, Petitioner IRENE MUELLER, has testi-
d that the Witness was in her proximity when
placed the twenty dollars on the counter;
refore, providing direct evidence that the
ness was also material as to the petty theft
rge. (Exhibit "D" p. 1)

Consequently, since the Honorable Thompson
her order to dismiss found the witness material
the the assault and battery charges and Petitione
testified under oath that the witness was near
in the store, to which the prosecutor could
refute, a reasonable person could conclude
t witness "X" was material as to the petty theft

In fact, not only was the witness material
to the petty theft, the business card that con-
ned the name, address and phone number of the
ness was, and is, material as to the defense.
hout the business card, Petitioner was unable
locate witness "X" as a possible witness for
defense; thereby, denying her a fair trial.

APPLICABLE LAW

I

The suppression by the prosecutor at the trial of evidence favorable to an accused violate due process where the evidence is material either as to guilt or punishment, irrespective of the good or bad faith of the prosecutor. Brady v. Maryland 373 U.S. 83,10 L.ED2d 215,83 S.Ct. 1194

Negligent suppression of material evidence by the government entitles a defendant to a new trial. State v. Heath 147 F.Supp. 877

> Heath decision stands for the principle that an outright dismissal of a criminal case is justified where the lost evidence is so vital to the defense of the case that a fair trial is impossible without it.
>
> In other words, in order for a defendant to be entitled to dismissal of a criminal charge on the basis of lost or destroyed evidence he must establish the critical nexus of materiality...materiality must be shown to the extent that the lack of such evidence deprives the defendant of his fundamental Constitutional rights to a fair trial.

In order for a conviction to be voided on account of suppression of evidence, it need not

pear that the prosecuting attorney was privy;
is sufficient if the suppression is by investi-
ting officers. Police are also part of the
osecution, and the taint on the trial is no less
they, rather than the state's attorney were
lty of the nondisclosure.

Failure of the police to reveal such material
dence in their possession is equally harmful
a defendant whether the information is purposely,
negligently, withheld. Barbee v. Warden 331
.R. 846, Walker v. Bishop 235 F.Supp. 767,
dy v. Maryland 373 U.S. 83, 83 S. Ct. 1194,
L.Ed.2d 215, Napue v. Illinois 360 U.S. 264,
S.Ct. 1173, 3 L.Ed.2d 1217

In United States v. Bryant 439 F.2d 642,
it was ruled that the government has a duty
reserve evidence that is material. "Hence,
old that before a request for discovery has
made, the duty of disclosure is operative
duty of preservation. And if government is
ative of that duty, it is a denial of that
ndant's due process rights."

II

Under California law, it does not make any difference whether the material evidence that is suppressed is done so willfully, negligently, or inadvertantly when it is done by a state agent representative if the suppressed evidence affects directly the question of guilt, the degree or amo of prejudice is not to be weighed or measured by the federal harmless error rule of Chapman v. California, 386 U.S. 18, 24, 17 L.Ed2d 705, 87 S. Ct. 824; if the suppressed evidence affects direc the question of guilt, the sole question is mater iality, and if found material, the judgment of conviction must be reversed.

In People v. Ruthford, 14 Cal 3rd 399,406, Chief Justice Wright, speaking for a unanimous Court, said:

> "We note, preliminarily, that when the evidence which is suppressed or otherwise made unavailable to the defense by conduct attributable to the State bears directly on the question of guilt our initial inqui is whether such conduct resulted in denial of a fair trial. If so, the judgment of conviction must be reversed without weighi

the degree of the prejudice to the accused. (Pyle v. Kansas 1942) 317 U.S. 213,216 87 L.Ed 214,216, 63 S.Ct. 177; In Re Imbler (1963) 60 Cal. 2d554, 567 (35 Cal. Rptr. 293,387 P.2d 6) wherein we stated: 'Moreover, suppression by the state of material evidence alone deprives a defendant of due process of law. It is necessary in such circumstances, of course, that the materiality of the evidence suppressed or otherwise not disclosed be examined in order that we may judge whether an accused has been fairly tried, but that examination is one which goes to the question of the evidence rather than prejudice to the accused.'

We conclude that the suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment. Chapman v. California (1967) 386 U.S. 18,24 (17L.Ed 2d 705,710-711, 87S.Ct.824)"

In the case at bar, investigating Officer

y was given a business card by witness "X"

aining at least the name of a material witness

he incidences that arose between the Petitioner

the security guard. Officer Kenny has stated

rial that the business card contained all the

ntial requirements to make the card material:

, address, and phone number.

The card was given to the police officer

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and then mysteriously disappeared. Thereby, dep
ving Petitioner of an essential part of her defe
and also has denied her due process rights under
the Fourteenth Amendment of the United State
Constitution.

We pray that Certiorari be granted to
resolve the serious constitutional issues present
herein.

Respectfully submitted,

IRENE MUELLER

In Pro Per

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APPENDIX C -- FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
...2 1982
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,

Plaintiff,

vs.

DAVID DIEBALL, et al.,

Defendants.

CASE NO. CV 81-1107 TJH

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Upon consideration of the moving papers in support of defendants' Summary Judgment Motion, and oral argument of counsel for the defendants and plaintiff, IT IS ORDERED under Fed. R. Civ. P. 56(b) that the following findings of fact and conclusions of law are without substantial controversy:

FINDINGS OF FACT

1. Probable cause existed to arrest and detain the plaintiff after she shoplifted cosmetic items from the J.C. Penney Store in the City Mall, in Orange, on or about January 25, 1979.

2. After placing the plaintiff under citizen's arrest, J. C. Penney store personnel contacted the Orange Police Department

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3. None of the defendants used excessive force against the plaintiff during her detention.

4. Officer Kenney received a business .ard from an unident fied individual (identified as "Mr. X" in the criminal proceedi which he beleives that he then gave to Officer Staton before le ing the store.

5. Officer Staton did not recall receiving this business c from Officer Kenney.

6. None of the defendants conspired to destroy this busines card, nor did any of them conspire to conceal the identity of "M X."

7. None of the defendants conspired to disperse witnesses connected with plaintiff's criminal trial.

8. None of the defendants committed perjury or conspired to commit perjury at plaintiff's criminal trial.

9. None of the defendants conspired to suppress any evidenc favorable to plaintiff's defense in connection with her criminal trial.

10. There was no conspiracy between J. C. Penney Company an the City of Orange Police Officers to deprive citizens of their constitutional rights.

11. All of the individual defendants in this action acted with good faith and with the reasonable belief that their action were legal in connection with the detention and arrest of plaint for shoplifting on January 25, 1979.

12. No one directed defendants Carol J. Manstrom or Marijan Ramstead on how to testify at plaintiff's November 1980 criminal

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13. Plaintiff has willfully failed to obey previous Court orders regarding doscovery efforts of the defendants.

14. The plaintiff has willfully failed to prosecute this action.

15. Any Conclusion of Law more appropriately deemed to be a Finding of Fact is incorporated herein as a Finding of Fact.

CONCLUSIONS OF LAW

1. Plaintiff is collaterally estopped from raising any claims regarding perjury of the defendants because this issue decided in their favor during her previous criminal trial.

2. Since none of the individual defendants used excessive force against plaintiff and had probable cause to detain and arrest her, there was no violation of her civil rights under 42 U.S.C. § 1983.

3. Plaintiff is collaterally estopped from raising any claims regarding probable cause, dispersion of witnesses, the loss of evidence and the existence of excessive force because she was found to be guilty of petty theft and assault and batt at her criminal trial and these issues were resolved adversely against her at that trial.

4. Because plaintiff persistently and willfully refused t be deposed by defendants, this Court ruled on January 4, 1982, that her testimony would be excluded at time of trial. That testimony also cannot be introduced into evidence in connectio with defendants' Motion for Summary Judgment. In addition, th testimony of Mr. Frank Marchuk is also inadmissible because it hearsay.

5. Plaintiff has therefore failed to produce any admissible evidence sufficient to oppose defendants' Motion for Summary Judgment.

6. Plaintiff cannot maintain a cause of action against the City of Orange for violation of her civil rights because there has been no showing that the City endorsed or encouraged such conduct. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

7. Plaintiff cannot maintain a cause of action against any of the private individuals for violation of her civil rights because there has been no showing that they were acting under color of state law.

8. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be incorporated here as a Conclusion of Law.

DATED: June 18, 1982

Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
United States District Judge

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and THE CITY OF ORANGE

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned declare:

That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Los Angeles, California, in which County the within-mentioned mailing occurred.

My business address is 550 South Hill Street, Suite 1300, Los Angeles, California 90013.

I served the following document:

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

of which THE ORIGINAL DOCUMENT, OR A TRUE AND CORRECT COPY, is attached, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

COURT OF APPEALS
OFFICE OF THE CLERK
P.O. Box 547
San Francisco, CA 94101

David R. Highman
P.O. Box 1786
Newport Beach, CA 92660

William P. Daley
555 W. Beech St.
Suite 400
San Diego, CA 92101

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 4, 1985, at Los Angeles, California.

Donna L. Osborne
DONNA L. OSBORNE